

as held in *Milford Docks Co. v. Milford Haven U.D.C.*⁽²⁾

The whole issue rests on the construction of section 2. Now, in order to satisfy the conditions of the section, the act must be done "in pursuance or execution or intended execution of any written law or any public duty or authority" or the neglect or default must be "in the execution of any such written law, duty or authority". Lord Buckmaster in *Bradford Corporation v. Myers*⁽³⁾ said:—

"...it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute or in the discharge of a public duty, or the exercise of a public authority."

Secondly, their Lordships observed in *Lee Hock Ning's* case that, in all the cases in which the neglect complained of was pure breach of contract, the constitution of the contract itself was a statutory duty either imposed on the authority or which the authority had imposed upon itself under statutory powers conferred on that behalf. In those cases the action was held to be protected by the Public Authorities Protection Act. The performance of a public duty through the medium of a contract must however be distinguished from the entering into a private contract in pursuance of an Act of Parliament which was the issue in *Lee Hock Ning's* case. It was held that the right of the respondent was not correlated with any statutory right or duty which was the provision of education but with the obligations entered into by the appellants in their contract with the respondent whose claim was not barred by the Ordinance.

The present case, in my view, does not seem to fall under either category stated above. In the first place, as conceded by the Senior Federal Counsel, the Federation of Malaya Schemes of Service is not a written law nor made under any powers given by statute and does not appear to be one which the Government has imposed upon itself under statutory powers. In the second place, though it is implied that a private contract has been entered into between the parties, it does not appear to have been done in pursuance of an Act of Parliament. It is difficult, if not impossible, to lay down any general principle to determine these questions. That was stressed by their Lordships in *Lee Hock Ning's* case. Nevertheless within the limits of what have been argued before me, the principle that should apply to this case is as stated in *Griffiths v. Smith*⁽⁴⁾ as "the true position". Lord Porter says as follows:—

"If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matters of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies.

A But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to a court of law, does not rest on statutory or public duty, but merely on a private and individual bargain."

B In the case before me the right of the individual teachers, namely, the plaintiffs, cannot be correlated with any public duty or authority as it depends upon the execution of a contract between the parties, the performance or non-performance of which is entirely left to the parties concerned. The neglect or default cannot be said to be done in the execution of a public duty or authority. Moreover, their relationship with the Government is contractual unless their rights and obligations are determined by statute or statutory rules which may be framed by the Government. (See *Roshan Lal v. Union of India*⁽⁵⁾ and *Government of Malaysia v. Rosalind Oh Lee Pek Im*⁽⁶⁾). The Federation of Malaya Schemes of Service referred to is not a written law and is not relied on by the Senior Federal Counsel as such in order to substantiate his argument. I am satisfied that the claim is not barred by the Public Authorities Protection Ordinance.

C In view of the above, it is not necessary to consider the second ground of objection.

D I therefore dismiss the application with costs.

E Application dismissed.

LAU FOO SUN v.

GOVERNMENT OF MALAYSIA

[F.C. (Azmi L.P., Suffian C.J. and Ali F.J.) November 20, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 92 of 1969]

G Copyright — Literary work — Whether engineering drawings and designs prepared by engineer constitute original "literary works" — Copyright Enactment (F.M.S. Cap. 73), ss. 2, 3 & 8.

Engineers — Engineering drawings and designs — Copyright in.

H The appellant, a chartered civil and structural engineer, had claimed a declaration that he was entitled to the copyright in the engineering drawings and designs prepared by him for the construction of double-storey classrooms for school for the Government. It was held in the High Court ([1970] 1 M.L.J. 20) that the appellant in preparing the drawings had substantially copied from P.W.D. drawings and therefore the appellant's drawings and designs were not original literary works so as to qualify for copyright under the Copyright Enactment. The appellant appealed.

I Held, allowing the appeal: the respondent had not rebutted the presumption that copyright existed in the appellant's works, as they had failed to prove that the appellant's works were nothing more than direct tracings of other original works or drawings. The engineering drawings and designs were "literary work" within the meaning of the Copyright Enactment and they were also "original literary work" within the meaning of the Enactment.

Cases referred to:—

(1) *University of London Press Limited v. University Tutorial Press Limited* [1916] 2 Ch. 601.

- (2) *Inala Industries Pty. Ltd. & Ors. v. Associated Enterprises Pty. Ltd.* [1960] Q.D. R. 562.

- (3) *Walter v. Lane* [1900] A.C. 539.

FEDERAL COURT.

S. D. K. Peddie for the appellant.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the respondent.

Ali F.J.: One of the questions which fell to be considered by the trial court in this case was "whether or not copyright exists in engineering drawings and designs." It was raised as part of the defence case in answer to the appellant's action for infringement of copyright. The second question, also raised by the defence, was "whether or not the engineering drawings and designs are original works within the meaning of the Copyright Enactment, F.M.S. Laws (Cap. 73)." The trial court answered the first question affirmatively and the second in the negative. This appeal, strictly speaking, is therefore concerned only with the second question.

The engineering drawings and designs in question were prepared by the appellant for the Ministry of Education for the purpose of constructing double-storey classrooms for schools. Under contracts made in 1961 the appellant, a chartered civil and structural engineer, was engaged by the Ministry of Education as consulting engineer, firstly for the construction of the Tun Fatimah School in Johor Bahru, and secondly for Works described as "Designs Programme 1961". Under these contracts he prepared structural and foundation drawings and supervised construction works in relation thereto. The details of his duties are set out in clauses 2A and 2B in both contracts which are mostly identical in terms. Clause 3 deals with the remuneration for his services under the contracts. Some of the drawings and designs prepared were used for the construction of the Tun Fatimah School in Johor Bahru and some for other schools including the one at Port Swettenham, Selangor. As they could be used again for building additional schools with similar designs there was provided in clause 14 as follows:

"14. Ownership of Documents and Copyright — All documents prepared by the Consulting Engineers in connection with the works are the property and copyright of the Consulting Engineers subject to their use by the client for the particular works to which this agreement relates. The client, however, may purchase the copyright at a fee of 1% of the total cost of the reinforced concrete works in the whole scheme and shall therefore, be entitled, either directly or indirectly, to make use of such documents for the carrying out of any additional or similar work."

Under this clause the Ministry bought some of the drawings and designs and negotiation for the purchase of other drawings was in progress when the appellant commenced action in February, 1963. In his evidence at the trial the appellant said that his claim relates only to those drawings which have not been bought and which are in the series 61020 beginning with number 109 onwards. Nos. 101 to 106 have already been bought by the Ministry. They relate to the construction of the school at Port Swettenham. For reasons which will become clear later they were marked as Exhibits D30 A to F.

Before February, 1963 things seemed to be going well between the appellant and the Ministry. There

was never any doubt as to the rights and obligations of the contracting parties under clause 14 with regard to the use of the drawings and designs. There was never any suggestion that they were not the original works of the appellant. But when sued for infringement of copyright the respondent took the point that the drawings are not the original works of the appellant because they were copied from the respondent's or P.W.D. drawings.

In his statement of claim the appellant has alleged that some of the drawings in the series 61020 from number 109 onwards were used by the Ministry without his consent or without paying him the fees as agreed under clause 14. Evidence was produced to support this allegation. This came from contractors who testified that they have built schools for the Ministry at Parit Buntar, Perak and at other places in Selangor and Pahang based on some drawings in the series 61020. The respondent did not consider it necessary to contradict this. The learned trial judge, too, did not make any finding on infringement or wrongful use of the drawings. The reason was stated in the following passage of his judgment:

"It is clear that for a copyright to subsist in a literary work as defined in the Enactment it must be shown to be the original work of the author. That brings me to the next matter in issue, namely, whether the designs and drawings made by the plaintiff were his original works or merely copies of existing documents belonging to the defendant. This indeed is the major question to be decided in this case, because the answer to this question would conclude the matter as to the success or failure of the plaintiff's claim and also dispose of the other issues in this case, namely, whether there has been any infringement of the plaintiff's copyright and what remedies he is entitled to." (The italics are mine).

The first question which I consider to be more important than the second is whether or not copyright subsists or exists in engineering drawings. The answer lies in the meaning of the word "literary work" as defined in section 2 of the Copyright Enactment. The learned trial judge was of the view that they are literary works. There is support for this view from authorities such as *University of London Press, Limited v. University Tutorial Press, Limited*⁽¹⁾ and the Australian case of *Inala Industries Pty. Ltd. and others v. Associated Enterprises Pty. Ltd.*⁽²⁾ In the former, Peterson J. said on page 608:

"It may be difficult to define 'literary work' as used in this Act" (Copyright Act of 1911), "but it seems to be plain that it is not confined to 'literary work' in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings as literary works, one thinks of the quality, the style, and the literary finish which they exhibit. Under the Act of 1842, which protected 'books,' many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors. In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, 'literary work' within the meaning of the present Act."

In the Australian case Mansfield C.J. said on page 570: "None of the ideas represented in the drawings were novel in the sense that they had been conceived by Day or by the plaintiffs for the first time. As far as I am able to ascertain, the technical literature which is in evidence, discloses this.

But the plan itself, which may be likened to a compilation in that it set out a collection of previously known details, was the production of the labour, knowledge and skill of Day. It was not a mere copy of written matter already published and apart from the plan the work did not exist. (*Macmillan & Co. v. Cooper* (1923) 40 T.L.R. 186; *Purefoy Engineering Co. Ltd. and Another v. Sykes Boxall & Co. Ltd. and Others* ((1955) 72 R.P.C. 89); *Walter v. Lane* ([1900] A.C. 539)."

The answer thus given to the first question should have concluded the matter. But it did not because of the second question which, as far as the respondent was concerned, was more important than the first question. In his submission to the court counsel for the respondent put the question in these words:

"Secondly, even if they come within the definition, they are not original works. The emphasis is on the word 'original'. The contention of the defence is that the plaintiff's work does not come within 'original work'. His work can only come within the definition of literary work."

In support of this contention six drawings Nos: 101 to 106 were produced for visual comparison with six P.W.D. drawings (Exhibits D32, D33, D34, D35, D37 and D39). The object was to show that there were more similarities than dissimilarities in the two sets of drawings. For instance, details in the drawings such as roof beams, the beams for the first floor, etc. were the same. The defence witness who said this was Mr. Ho Tee Hian, a qualified engineer. He, however, admitted that there were also some differences, for example, in the foundation dimensions. With regard to this he said:

"I agree that there was a difference made in the foundation. Therefore a thought was given to it. The cross-sections in the two drawings are the same except for the figured dimensions. Figured dimensions are very important to the builder. They are important factors in all drawings."

Shortly stated, there are more similarities than differences in the drawings which were compared. But not all drawings in the series 61020 could be compared. This was because the respondent could not produce any corresponding P.W.D. drawings for comparison. Be that as it may the learned trial judge had this to say:

"As regards the drawings D48-D53, there is evidence before me that at least some of them were copied from the drawings D30a-f, as stated by D.W.1. Some of these drawings, as stated by that witness, were not similar to the drawings D30a-f but there is his" (Mr. Ho's) "evidence, which was never challenged, that the drawings in the 61020 series from 109 onwards were the same as the drawings D30a-f except for the modifications in the foundations, staircases and figure dimensions, and that as far as he could remember the plaintiff's firm did only one design for the Ministry of Education which was their original design. That evidence of his must necessarily destroy the submission by counsel for the plaintiff that the defendant had not produced one foundation drawing from which they alleged that the plaintiff had copied and the further submission on behalf of the plaintiff that he had shown infringement of drawings 113, 119, 120 and 121 in the series 61020." (The italics are mine.)

This, I must say with respect, cannot be accepted as a reasonable finding of fact. It is not easy to show that the appellant's drawings are not original work merely by comparing them with P.W.D. drawings. It is even more difficult to do so when there is absolutely no basis for saying that certain details in the appellant's drawings are the same as those in the P.W.D. drawings which are not available for comparison. The learned trial judge also erred in saying

A "the plaintiff's firm did only one design for the Ministry of Education which was their original design." He was apparently referring to the evidence of Mr. Ho which was this:

"C. H. Teoh did not trace any P.W.D. drawings. We were engaged only on a supervisory capacity. As far as I can remember we did only one design for the Ministry of Education which was our original design."

B C. H. Teoh is clearly not the plaintiff's firm.

Upon the evidence, such as it was, the learned trial judge concluded in these words:

C "To sum up, it is my view and I find as a fact, that in preparing the drawings on which this claim is based the plaintiff's engineers copied such portions from P.W.D. drawings that they desired to include in their own drawings and that certain changes and additions were made. With the exception of some of the drawings, they did not make exact copies of the P.W.D. drawings but I am satisfied that they made substantial copies from them. In the circumstances, I hold that the plaintiff's drawings were not original literary work within the meaning of the Enactment so as to qualify for a copyright in them."

D The memorandum of appeal contains several grounds. I propose to consider only a few. As to the similarities in the drawings compared the appellant said they were not copied in the sense that they were directly traced from P.W.D. drawings. Indeed, there was absolutely no evidence of direct tracing. Some of the details looked the same because they have to be so. The appellant's drawings are actually structural and foundation drawings. He was not concerned with the architectural part of the drawings. This was a matter for the architect. Therefore, if the drawings in the series 61020 contain architectural details which look the same as in P.W.D. drawings it was because he was not supposed to incorporate different details. Thus explained it must be clear that there is no substance in the defence contention that the appellant's drawings are not original.

Another ground in paragraph 23 of the Memorandum of Appeal reads:

"23. In holding that the plaintiff's drawings were not original literary work within the meaning of the Enactment the learned trial judge misdirected himself in law as to the requirements of the Enactment."

G This, I think, is the crux of the whole matter. Even if it is possible to accept the finding of fact that the appellant had copied substantial portions from P.W.D. drawings, does it in law affect the originality of the appellant's works? The learned trial judge thought it does in view of the word "original" in section 3(i) of the Enactment. The section provides:

H "3. (i) Subject to the provisions of this Enactment, copyright shall subsist throughout the Federated Malay States for the term hereinafter mentioned in every original literary, dramatic, musical and artistic work, if—

(a) in the case of a published work, the work was first published within the Federated Malay States; and

I (b) in the case of an unpublished work, the author was at the date of the making of the work a subject of one of the Rulers or resident within the Federated Malay States,

but in no other works except so far as the protection conferred by this Enactment is extended by notification in the Gazette in accordance with Section 22."

The word as it stands clearly does not mean originality of idea or thought. It refers to the work either published or unpublished. Originality of idea is not the subject-matter of copyright. So said Earl of Halsbury.

the Lord Chancellor in *Walter v. Lane*.⁽³⁾ In that case a verbatim report of speeches made by Lord Rosebery was published in the newspaper "The Times". The defendant admitted copying the speeches from the said report and incorporating them in his book called "Appreciations and Addresses: Lord Rosebery". His argument that there could not be any copyright in the published report because Lord Rosebery and not the reporter was the author of the speeches was rejected. On page 548 the Lord Chancellor said:

"I do not find the word 'original' in the statute, or any word which imports it, as a condition precedent, or makes originality of thought or idea necessary to the right...."

On page 549 he went on to say:

"Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report;...."

The same view was expressed in *University of London Press, Limited v. University Tutorial Press, Limited*⁽¹⁾ and in the Australian case *Inala Industries Pty. Ltd. and Others v. Associated Enterprises Pty. Ltd.*⁽²⁾ These authorities apply inasmuch as our Copyright Enactment is substantially a reproduction of the English Copyright Act, 1911.

Apart from the authorities section 8(iii) of the Enactment is clear in terms that there is a statutory presumption that copyright exists in any work. It is, of course, a rebuttable presumption. For the respondent to rebut it must be shown that the appellant's works are nothing more than direct tracings of other original works or drawings. This the respondent failed to do for various reasons. In the first place P.W.D. drawings said to have been copied from can hardly be described as complete works which could be used as final working drawings. If they could there was no point in buying the appellant's drawings. Secondly, it seems clear from the evidence that the drawings in the series 61020 are still needed by the Ministry for building additional schools. The evidence of the contractors point to this. As such they are clearly published works in which copyright exists.

For the reasons above stated I would allow this appeal with costs here and below.

In the writ of summons dated 19th February, 1963 the appellant has prayed for declarations in terms as stated therein. He has also asked for certain consequential reliefs such as account and order for payment due upon taking such account. Alternatively in paragraph 10 of the statement of claim he prayed for damages for infringement of copyright. So far as he is entitled to be paid under clause 14 for the use of his drawings any monetary relief would have to be assessed in accordance with that clause. Accordingly, there will be an order for account in respect of the use of the drawings in the series 61020 which have not been bought by the Ministry and any amount found due under clause 14 upon taking such account shall be paid to him. Liberty to apply for such order or orders as may be necessary to give effect to this judgment.

The appellant shall have the refund of his deposit.

Azmi L.P. and Suffian C.J. concurred.

Appeal allowed.

Solicitors: *Skrine & Co.*

A CHEAH TEONG TAT v. HO GEE SENG & ORS.

[O.C.J. (Syed Agil Barakbah J.) November 20, 1973]

[A'or Star — Originating Motion No. 20 of 1972]

Practice and Procedure — Appeal — Application to serve notice of appeal out of time — Ignorance of law not sufficient to constitute ground — Special circumstances must be shown — Subordinate Courts Rules, 1950, Order 39.

B In this case the applicant applied for leave to file notice of appeal out of time. The applicant had filed notice of appeal but did not serve a copy of the notice on the respondents or their solicitors within fourteen days of the decision being made. The copy of the notice of appeal was subsequently served on the respondent's solicitors and the relief sought was for the court to deem that the service was good service or alternatively to extend the time for service of such notice.

C **Held:** as the applicant had shown no special circumstances upon which the court could exercise its discretion to extend or enlarge the time to file notice of appeal, the application must be dismissed.

Cases referred to:-

(1) *Ahmad bin Yahaya & Anor. v. Ahmad bin Sulaiman* [1972] 2 M.L.J. 109.

D (2) *Liew Chee Tat v. Lok Moon & Ors.* [1972] 2 M.L.J. 29.

(3) *Gatti v. Shoosmith* [1939] 1 Ch. 841.

(4) *In re Coles and Ravenshear* [1907] 1 K.B. 1.

(5) *Chong Kueng Ying & Ors. v. Lovis Lavague* [1972] 1 M.L.J. 180.

(6) *John Paddicombe Wilkins & Ors. v. John Patrick Kenelm Wilkins & Anor.* [1951] M.L.J. 80.

E (7) *Krishnasamy & Ors. v. D.C. Butler Madden* [1947] M.L.J. 182.

ORIGINATING MOTION.

Mrs. B. H. Oon for the applicant.

A. Jayadeva for the respondent.

F **Syed Agil Barakbah J.:** This is an application for leave to file notice of appeal out of time for the purpose of appealing to this Court. The relief sought is for the Court to hold that notice of appeal served on the respondents' solicitors on July 8, 1972, to be deemed good service or, alternatively, the time for service of such notice on the respondents' solicitors be extended for a period of 14 days from the date of any order to be made by this court.

G The applicant who was the defendant in Civil Action No. 37 of 1971 being dissatisfied with the decision of the learned President, Sessions Court, Sungei Patani, who on May 6, 1972, gave judgment in favour of the respondents, the plaintiffs in the said action, filed notice of appeal in the Sessions Court, Sungei Patani, on May 11, 1972, but did not serve a copy of such notice on the respondents or their solicitors. On the same day he applied for a certified copy of the notes of evidence. Subsequently on June 29, 1972, he was supplied with the notes of evidence together with the grounds of judgment and a request to deposit a sum of \$200 into court for the purpose of preparing the appeal record and costs of appeal within 14 days from the date stated above. On July 4, 1972, he consulted his solicitors. On July 6, 1972, he sent the required fee and notice of appointment of solicitors to the Sessions Court. The same day his solicitors wrote to the respondents' solicitors forwarding them by way of service a copy of the notice of their appointment as well as a copy of the notice of appeal. The respondents' solicitors in turn in their letter dated